

37 Am. Jur. 2d Fraud and Deceit § 129

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Fraud and Deceit

George Blum, J.D., John Bourdeau, J.D., Romualdo P. Eclavea, J.D., Janice Holben, J.D., Karl Oakes, J.D. and Eric C. Surette, J.D.

IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

3. Particular Kinds of Representations, Transactions, Relief, etc.

b. Negligent Misrepresentation

§ 129. Privity or special relationship

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  13(3)

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[Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon, 32 A.L.R.2d 184](#)

While negligent misrepresentation claims frequently arise when the parties have a relationship,¹ under some authority, privity of contract between the parties is not an element of negligent misrepresentation,² and need not be proved by plaintiff.³ Under this view, a third party, although not in privity, has a claim for the alleged negligence of a professional who renders an opinion upon which the third person relies to its detriment.⁴

Other courts limit negligent misrepresentation claims to situations involving actual privity of contract between the parties,⁵ or at least a relationship so close as to approach that of privity.⁶ Liability may arise despite a lack of privity where the defendant assumes a duty to convey information accurately,⁷ or where there is intimacy of the resulting nexus and a bond so close as to approach that of privity.⁸ Under this view, a claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff;

(2) that the information was incorrect; and (3) reasonable reliance on the information.⁹ There is also authority that a plaintiff may recover against a professional who negligently makes representations or gives advice only if there is privity of contract or if the negligent professional had actual knowledge that the plaintiff would be affected by the representations made.¹⁰ Under a related approach, in determining whether a duty is owed where plaintiff alleges negligent misrepresentations in a professional's report and there is an absence of privity of contract or fiduciary relationship between plaintiff and the alleged tortfeasor, the courts consider: (1) whether the tortfeasor could expect that plaintiffs would receive and rely upon the information, (2) whether plaintiffs are members of the limited group for whose benefit and guidance the report was contracted and supplied, (3) whether the report was prepared in the context of a business transaction for which the alleged tortfeasor received compensation, and (4) whether extending tort liability would serve public policy.¹¹ It has been said in this regard that unlike a professional malpractice or negligence claim, liability for a negligent misrepresentation claim is not based on a breach of duty a professional owes a client or others in privity; rather, liability is based on the professional's manifest awareness of the nonclient's reliance and the professional's intention that the nonclient rely on the professional's representations.¹²

The Restatement Second, Torts provides that one who, in the course of his or her business, profession, or employment or in any other transaction in which he or she has a pecuniary interest, supplies false information for the guidance of others in their business transactions is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information if he or she fails to exercise reasonable care or competence in obtaining or communicating the information.¹³

Observation:

Negligent misrepresentation has no application in an employment relationship where representations are made to "sell" the company rather than to guide the employee with professional advice.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

Under West Virginia law, a special duty or relationship must be proven to support a claim for reckless or negligent misrepresentation. [Tinsley v. OneWest Bank, FSB, 4 F. Supp. 3d 805 \(S.D. W. Va. 2014\)](#).

Determining whether a special relationship exists ordinarily requires a fact-intensive, case-by-case inquiry, for purposes of a negligent misrepresentation claim under New York law. [Schwartzco Enterprises LLC v. TMH Management, LLC, 60 F. Supp. 3d 331 \(E.D. N.Y. 2014\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Jeffries v. Pat A. Madison, Inc.](#), 269 S.W.3d 689 (Tex. App. Eastland 2008).
- 2 [White v. Bowman](#), 304 S.W.3d 141 (Mo. Ct. App. S.D. 2009); [Miller v. Big River Concrete, LLC](#), 14 S.W.3d 129 (Mo. Ct. App. E.D. 2000).
- 3 [Jeffries v. Pat A. Madison, Inc.](#), 269 S.W.3d 689 (Tex. App. Eastland 2008).
- 4 [Richey v. Philipp](#), 259 S.W.3d 1 (Mo. Ct. App. W.D. 2008).
- 5 [Anschutz Corp. v. Merrill Lynch & Co., Inc.](#), 690 F.3d 98 (2d Cir. 2012) (applying New York law); [Huntington Mortg. Co. v. Mortgage Power Financial Services, Inc.](#), 90 F. Supp. 2d 670 (D. Md. 2000), *aff'd*, 3 Fed. Appx. 126 (4th Cir. 2001).
- 6 [Anschutz Corp. v. Merrill Lynch & Co., Inc.](#), 690 F.3d 98 (2d Cir. 2012) (applying New York law).
Under Ohio law, a special relationship under which the defendant supplied information to the plaintiff for the latter's guidance in its business transaction, as required on a claim for negligent misrepresentation, occurs only in special circumstances; usually the defendant is a professional who is in the business of rendering opinions to others for their use in guiding their business, and the plaintiff is a member of a limited class. [Ford v. New Century Mortg. Corp.](#), 797 F. Supp. 2d 862 (N.D. Ohio 2011).
- 7 [Zampatori v. United Parcel Service](#), 125 Misc. 2d 405, 479 N.Y.S.2d 470 (Sup 1984).
- 8 [Tennessee Hospital Service Ass'n v. Strang](#), 49 Tenn. App. 263, 354 S.W.2d 488 (1961).
- 9 [Mandarin Trading Ltd. v. Wildenstein](#), 16 N.Y.3d 173, 919 N.Y.S.2d 465, 944 N.E.2d 1104 (2011).
In deciding whether liability for negligent misrepresentation can be imposed against an accountant by a nonprivity third party, the court asks whether the accountant was aware that the reports were to be used for a particular purpose, whether in furtherance of such purpose a known party was intended to rely and, finally, whether there was some linking conduct which evinced the accountant's understanding of that party's reliance. [Securities Investor Protection Corp. v. BDO Seidman, L.L.P.](#), 95 N.Y.2d 702, 723 N.Y.S.2d 750, 746 N.E.2d 1042 (2001).
An architect for a condominium building was not in the functional equivalent of privity with the architect of record for the design and construction of an apartment in the building, and thus, the apartment architect failed to state a negligent misrepresentation claim based on the functional equivalent of privity, even if the building architect failed to inform the apartment architect that its plans did not comply with building codes and other regulations, where there was no evidence that the building architect intended for the apartment architect to rely on it or that the building architect engaged in conduct evincing such understanding. [Beck v. Studio Kenji, Ltd.](#), 90 A.D.3d 462, 935 N.Y.S.2d 5 (1st Dep't 2011).
- 10 [Querrey & Harrow, Ltd. v. Transcontinental Ins. Co.](#), 861 N.E.2d 719 (Ind. Ct. App. 2007), *transfer granted*, *opinion vacated*, IN RAP 58(A), (Aug. 7, 2007) and *opinion adopted*, 885 N.E.2d 1235 (Ind. 2008).
- 11 [Audler v. CBC Innovis Inc.](#), 519 F.3d 239 (5th Cir. 2008).
- 12 [Ervin v. Mann Frankfort Stein & Lipp CPAs, L.L.P.](#), 234 S.W.3d 172 (Tex. App. San Antonio 2007).
- 13 [Restatement Second, Torts § 552\(1\)](#).
- 14 [Schoff v. Combined Ins. Co. of America](#), 604 N.W.2d 43 (Iowa 1999).

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